Teamsters Local Union No. 435, affiliated with the International Brotherhood of Teamsters, AFL–CIO[1] (Super Valu, Inc.) *and* Lewis D. Nicholoff. Case 27–CB–3195

May 26, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On October 26, 1993, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Teamsters Local Union No. 435, affiliated with the International Brotherhood of Teamsters, AFL–CIO, Denver, Colorado, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] The name of the Respondent has been changed to reflect the official name of the International Union as revised at its June 1991 convention.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We agree with the judge that the Respondent violated its duty of fair representation by proposing and agreeing that, once Super Valu's general merchandise operation was relocated to its Tower Road facility, the more desirable general merchandise positions would be placed in the grocery rather than general merchandise department and the general merchandise employees' seniority would be based on their length of representation by the Respondent, since as Vairma, the Union's vice president, admitted, the general merchandise employees ''had only been in the union for a short period of time.'' As noted by the Respondent, *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB 974 (1986), cited by the administrative law judge, differs somewhat from the present case in that in *Daly* seniority was endtailed even though employees from two units at separate locations were consolidated at a new, third location, while in the present case an operation of the Employer was relocated to an existing facility with an established unit. Nevertheless, in both cases the unions advocated granting less seniority to one of the employee groups on the impermissible basis that the employees in that group had not been represented by a union as long as the employees in the other group. In addition, the Union here also relied on the impermissible basis that the employees in the first group had once voted against union representation.

Michael W. Josserand, Esq., for the General Counsel.
Eugene A. Duran, Esq., of Denver, Colorado, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on July 29, 1993,[1] at Denver, Colorado. The charge was filed by Lewis Nicholoff, an individual, on February 23, 1993. On April 8, 1993, the Regional Director for Region 27 issued a complaint, which was amended at hearing, alleging Local Union No. 435 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Respondent or the Union) violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act).

Respondent's timely filed answer to the complaint, as amended, admits certain allegations, denies others, and denies any wrongdoing. Respondent also raised several affirmative defenses that are considered in this decision.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, on the briefs that were filed, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent's answer to the complaint and stipulations entered admit Super Valu, Inc. (the Employer or Super Valu), with offices and places of business in Aurora, Colorado, meets one of the Board's jurisdictional standards and that the Union is a statutory labor organization.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The principal issue in this case is whether Respondent breached its duty of fair representation to certain employees it represents by its conduct in negotiating the provisions of agreements concerning the combining of two separate units into a single unit.

Many of the facts in this proceeding are uncontroverted.[2] The Employer is engaged in the wholesale distribution of grocery and general merchandise items to independent retailers. In 1982, Super Valu entered the Denver, Colorado area market in which it purchased a warehouse located on Brighton Boulevard in Aurora, Colorado, that had been owned by Western Grocers. The former employees of Western Grocers were represented by Respondent. The Union has represented the employees at that warehouse since 1940. Super Valu rec-

[1] All dates are in 1992 unless otherwise indicated.

[2] I have included as background some of the facts found in *Super Value Stores*, 283 NLRB 134 (1987).

ognized Respondent as the drivers' and warehouse employees' collective-bargaining representative.

Western Grocers had reconfigured the warehouse and eliminated the general merchandise portion of the business. When Super Valu acquired the business, much of the general merchandise portion of the operation had been eliminated. In 1983 a major customer requested Super Valu to supply general merchandise. Initially, Super Valu supplied the customer from its Omaha, Nebraska warehouse. As the Board found (id. 283 NLRB 134),

> [t]he General Merchandise shipments from Omaha were integrated with grocery orders at the Brighton warehouse where they were shipped to customers. After several months, the Employer decided to establish a major general merchandise operation within the Denver division because inconsistent delivery schedules and late deliveries had made the Omaha arrangement unsatisfactory.

Around May 1984, Super Valu leased a warehouse about 10 miles from the Brighton warehouse and established Preferred Merchandisers to conduct its general merchandise operation. Preferred Merchandisers was established as a nonunion operation for ''competitive reasons.'' The general merchandise operation was described as the warehousing and distribution of ''those over-the-counter drug-type items that you would buy at a grocery store, as well as housewares type items and brooms. In the health and beauty care side, it is shampoos, aspirin, just all those kind of things that are in that section of the grocery store.'' The general merchandise and grocery products are sold to the same customers.

Super Valu did not hire any of the employees represented by the Union when it opened the Preferred Merchandisers warehouse and refused to apply the existing collective-bargaining agreement to those employees. The Union filed a grievance asserting it also represented Preferred Merchandisers' employees. An arbitrator decided the Union did represent these employees in the same unit as the grocery employees.[3] The arbitrator ordered Super Valu to apply the grocery contract to the Preferred Merchandisers operation and the Preferred Merchandisers positions be posted at the Brighton warehouse ''for bidding by bargaining unit employees as provided by the contract.'' Initially, Super Valu started complying with the arbitrator's decision, but then ceased and filed a unit clarification petition under Section 9(c) of the Act. In *Super Valu Stores*, Id. the Board determined Preferred Merchandisers was not an accretion to the existing unit, rather it was a separate appropriate unit.

In 1987, Super Valu acquired another warehouse (Tower Road) and moved the grocery and perishable food operations there. There was some integration of operations between the Tower Road and Preferred Merchandisers facilities. The customers' orders were separated into grocery and general merchandise orders, and the Preferred employees first ''pulled'' the general merchandise portion of the order, which was loaded and trucked to the grocery warehouse where the orders were consolidated with grocery items for delivery to the customer by drivers in the grocery unit.

[3] The arbitrator's decision was based, at least in part, on the arbitrator's finding that Western Grocers at one time handled general merchandise in its operations.

Respondent then sought to organize the employees of Preferred Merchandisers. In 1988, Respondent petitioned and an election was held in Case 27–RC–6874. On October 21, 1988, the Region certified that no collective-bargaining representative had been selected. In or before 1990, rumors were circulating among the Preferred Merchandisers employees that Super Valu may combine the Preferred Merchandisers operation with the Tower Road grocery operation. This rumor led one Preferred Merchandisers employee, Calvin Bishop, to telephone Respondent and seek representation. Another election was conducted in 1990, and in Case 27–RC–7146, the Regional Director certified that the Union had been selected as the collective-bargaining representative of the Preferred Merchandisers employees.

The collective-bargaining agreement negotiated for the Preferred Merchandisers employees accorded them seniority for the period of their employment with Preferred Merchandisers. Bishop was on the negotiating committee and he testified:

> Q. Do you remember ever discussing with union officials during those negotiations how your seniority would be fit in with Tower Road if the two facilities were—if the two warehouses were put together?
>
> A. I understood that we would just take it with us.
>
> Q. Did you request to negotiate something like that in your contract in 1991?
>
> A. Yes, we did.
>
> Q. What did the union say about negotiating that kind of language?
>
> A. That we shouldn't have it in our contract.
>
> Q. Why?
>
> A. He [Steve Vairma] figured that we might do better if we did it when they were closer to doing the move.[4]

Vairma, vice president of Respondent and a business representative, did not expressly refute this testimony of Bishop. I find Bishop's detailed rendition of the events involved herein the more credible version. Bishop's recitation of events was accomplished with considerably persuasive detail, he gave the strong impression he was making an honest attempt to accurately recall the facts. In addressing the Preferred Merchandisers employees' concerns about work preservation, Respondent and Super Valu negotiated the following provision:

> Article 1.02: Should the Employer move the warehouse operation to any location within Colorado, present employees will, at their own expense, be offered opportunities for employment prior to any new hires at the new location.

[4] Vairma recalled the Preferred Merchandisers employees' request as follows:

> Q. In 1991, during the negotiations of the Preferred contract, do you recall employees wanting at that time to bargain a provision that if the Preferred warehouse moved to Tower Road that they would—the seniority would be dovetailed in?
>
> A. Yes, I do.
>
> Q. And you told them at that time that you couldn't bargain the Tower Road contract in their negotiations.
>
> A. That is correct.

B. *Negotiations for a New Contract for Tower Road*

The Tower Road collective-bargaining agreement was due to expire in 1992. In contemplation of the combining of the Preferred Merchandisers and Tower Road operations, Respondent and an elected negotiating committee from the Tower Road facility entered negotiations with Super Valu.[5] The Preferred Merchandisers employees were concerned about the terms of this agreement that would affect their terms and conditions of employment. In September, Bishop telephoned Vairma and:

> I asked him if myself could go and sit in negotiations while they talked about the merger of the company, or if somebody else from the company could. And he said no.
>
> Q. Did he say why?
>
> A. He said it didn't concern us, that it wasn't our bargaining unit.[6]

Bishop also asked Vairma if the negotiations included ''what is going to happen to Preferred Merchandisers when it transfers over to Tower Road,'' and Vairma said this was a subject of the Tower Road contract negotiations. Bishop and the other Preferred Merchandisers employees were denied the opportunity to sit in on any of the negotiations for the 1992 Tower Road collective-bargaining agreement.[7] Vairma admittedly viewed his obligations to the Tower Road unit as: ''What that committee who is representing the entire bargaining unit wants me to do, under your direction.'' He further testified:

> Q. But your only duty is to that committee.
>
> A. That is who I answer to at that time and ultimately to the membership. Yes.

I credit Bishop's testimony over Vairma's testimony where they are in conflict and Vairma's testimony will be credited only where it is credibly corroborated or an admission against Respondent's interests. Vairma was not a credible witness based on demeanor. He did not appear candid and forthright. Vairma seemed to be tailoring his testimony to fit Respondent's litigation theory. On occasion, he testified inconsistently or in variance with his affidavit. I also note Vairma exhibited poor recall, at times he was uncooperative, and he volunteered information.

Super Valu's initial proposal to Respondent during the Tower Road negotiations included the establishment of a new general merchandise department by dovetailing the Preferred Merchandisers employees' seniority with the Tower Road employees' seniority and all employees would be covered by the Tower Road agreement.[8] Showalter testified, without contradiction, that Respondent was ''reluctant to bargain over this.'' According to Vairma,[9] the Tower Road bargaining committee was opposed to dovetailing seniority. The Union's counterproposal was to initially permit all Tower Road employees to bid for the general merchandise positions and to pay the general merchandise employees 85 percent of the warehouse rate.

This proposal is dissimilar to the method of bidding established by the Tower Road collective-bargaining agreement. Employees bidding for positions under the Tower Road collective-bargaining agreement are selected based on departmental preference and seniority. Thus, if an employee from the meat department has 20 years' seniority and bids for a forklift driver position in the grocery department, a bid from an order selector from the grocery department who has 1-year seniority would be the successful bid. The Respondent's counteroffer to Super Valu's proposal would have opened up all Preferred Merchandisers positions to general bidding and would have eliminated departmental preferences. The Union

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[5] At one time, Super Valu was considering several options concerning the general merchandise operation. In addition to moving the general merchandise operation to Tower Road, one option was to subcontract the Preferred Merchandisers operation and another was to combine the general merchandise business into regional warehouses outside the Denver area. The probability of these options being selected was not discussed on the record. The options were presented to Respondent by Super Valu during the negotiations for the Preferred Merchandisers collective-bargaining agreement in 1991. The viability of these options in 1992, during the negotiations of the Tower Road collective-bargaining agreement was not placed in evidence. The Preferred Merchandisers warehouse was leased and Super Valu wanted to resolve the question of where the operation would be located prior the expiration of the lease in May 1993. There is no evidence the possibilities of subcontracting or locating out of state were raised in the Tower Road negotiations. Thus, the record will not support a conclusion the subcontracting and moving the general merchandise operation out of Colorado or to a location other than Tower Road was a viable consideration during the 1992 Tower Road negotiations.

[6] Vairma testified, in partial corroboration of Bishop:

> Q. What did you tell Mr. Bishop?
>
> A. I told him that we would not have him in there. He was not a member of that bargaining unit or that bargaining committee.
>
> Q. And that what was being discussed didn't concern him.
>
> A. I don't believe I said that.
>
> Q. But you do recall telling him that he couldn't be present.
>
> A. That is correct.

[7] In contrast, as Vairma admitted, a representative of the Tower Road unit, Keith McCormick, was permitted to sit in on the negotiations for the Preferred Merchandisers collective-bargaining agreement. Vairma did not explicitly describe McCormick's role, and he did not recall if McCormick attended all the bargaining sessions. According to Vairma's unsubstantiated testimony, McCormick was present ''more for my advisory purposes.'' There was no evidence concerning McCormick's role leading to the inclusion of art. 1.02 rather than the protections of the Preferred Merchandisers employees seniority requested by Bishop, described above. Vairma did not differentiate between McCormick's ''advisory'' role, which Respondent found permissible, and the role sought by Bishop to attend the Tower Road negotiations. There is no claim by Respondent that McCormick did not have any role in the decision to not include any of the sought protections in the Preferred Merchandisers collective-bargaining agreement.

[8] Super Valu also proposed the Preferred Merchandisers employees retain their rates of pay, which were 70 percent of the Tower Road warehouse rate. According to Super Valu's representative, Jim Showalter, the offer was to meet Super Valu's goal of establishing certainty in wages and operation if it decided to move the general merchandise operation to Tower Road. This offer also included Super Valu's preference of having employees performing the general merchandise work who were familiar with that operation and who were paid reasonable and competitive rates.

[9] None of the employee members of the Tower Road bargaining committee appeared and testified in this proceeding. Thus, Vairma's testimony was not corroborated and it is not credited.

also proposed that, for bidding against Tower Road employees, all Preferred Merchandisers employees would have only union seniority, which is the effective date of the Preferred Merchandisers collective-bargaining agreement, June 11, 1991.

Preferred Merchandisers has 27 employees; the most senior is Connie Throckmorton, who was hired February 27, 1985. Throckmorton is a clerk. Clerks were included in the Preferred Merchandisers unit but not in the Tower Road unit, so when she transferred to Tower Road, she did not have to bid for a position, she was able to retain her company seniority and position. Only four Tower Road employees were hired after June 11, 1991, and hence would be less senior to the Preferred Merchandisers employees. Twenty-five of the Preferred Merchandisers employees were hired prior to June 11, 1991. As the General Counsel noted on brief, as a result of the Union's proposal, the 25 Preferred Merchandisers employees with hire dates prior to June 11, 1991, would be senior to only 4 Tower Road employees. If the seniority had been dovetailed, the most senior Preferred Merchandisers employee would have been number 36 instead of number 135 on the union seniority list. Lou Nicholoff would have been the most senior Preferred Merchandisers employee with a hire date of December 28, 1985.

Respondent also proposed the general merchandise department have only order selecting and stocking positions.[10] As Showalter testified:

> Q. Now, your original proposal was to simply establish a General Merchandise Department. Is that correct? And it didn't identify what work or what classifications would be in that department. Is that accurate?
>
> A. That is correct.
>
> Q. And it was the union that proposed specificity; that is, that those would be stocker and selector.
>
> A. That is correct.
>
> Q. And the content of the other jobs that have been performed in the Preferred warehouse—and I am using forklift, receiver—those are still performed at the Tower Road facility as it relates to the General Merchandise product. Is that accurate?
>
> A. Yes.
>
> Q. They are simply performed in other departments.
>
> A. They are performed by people out of other departments, out of the Grocery Department specifically.

The positions eliminated from the Preferred Merchandisers unit include office clerical, receiving, forklift jobs,[11] sanitation and salvage. Super Valu did not want any duplication of function in departments when it moved the general merchandise operation to Tower Road.

The Tower Road collective-bargaining agreement did not contain stockers in the unit position descriptions. The effect of this proposal was to eliminate the most desirable positions from the work performed by the Preferred Merchandisers employees; a reduction in the jobs the Preferred Merchandisers employees could bid for when they moved to Tower Road, and for the first time at Tower Road, the establishment of a department where employees from another department regularly worked as part of another department.[12] Showalter testified forklift operators would be present in the general merchandise department much of the workday. However, during negotiations, Showalter understood there would be no forklift work in the general merchandise department. He admittedly misunderstood the design of the general merchandise department at the time of negotiations. There was no claim any of Respondent's representatives similarly misunderstood the design and operation of the general merchandise department at Tower Road or relied on any expression by Super Valu.

Of the 27 Preferred Merchandisers employees holding bid positions in June 1993, 5 were forklift operators, 3 were receivers, and there was 1 each in the following classifications: salvage, inventory control, and sanitation. The order selector and stocking positions were considered the least desirable classifications because they required the most physical work.[13] The general merchandise department constructed at the Tower Road warehouse has two mezzanines designed to hold the general merchandise, which reduced the need for forklift operators, although there will be some forklift operations in the area, none of which will operate on the mezzanines. The general merchandise department is so constructed, that, according to Showalter, forklift operators will work full time in that area. Arnold, who has been working at Tower Road preparing for the move, corroborated Showalter. Arnold observed forklift and receiving operations at Tower Road being consistently performed in the general merchandise department by grocery employees. There is no claim these operations will change once the move of the general merchandise department has been completed.

The Preferred Merchandisers employees considered the stocker and selecting positions the least desirable. The selecting job at Preferred Merchandisers does not involve items of as great weight as comparable work performed in the grocery department at Tower Road, which involves lifting items that

[10] Showalter described the operation as follows:

> we generate billing; we call it billing; picking tickets by computer, and there are little stickers that come off that the employee takes that sticker and selects the merchandise, and then applies that sticker somewhere, where it would be visible.
>
> The order selector would be the one taking those stickers, going around, and picking the customer's order and getting it ready to be staged for shipment.
>
> A stocking person would be a person that is taking merchandise or product out of reserve and putting it into the picking slots.

[11] Showalter testified Super Valu had not expressly considered eliminating forklift jobs from the Preferred Merchandisers unit until Respondent made its initial counteroffer.

[12] The operations at Tower Road, which had several departments, restricted the work of the employees to their respective departments, except for overtime on those occasions when departmental employees were not interested in the overtime; then the opportunity to perform overtime was opened to employees from other departments. When Super Valu attempted to assign employees work outside their department and outside their bid position in situations not involving overtime, grievances were filed claiming such assignments violated the collective-bargaining agreement. These grievances are currently at step two and have not been resolved. Respondent did not claim to oppose or not support these grievances.

[13] Allen Arnold, an order selector for Preferred Merchandisers for 5-1/2 years, testified he viewed as desirable positions those of ''forklift, inventory control, receiver, salvage, [and] sheller.'' None of these ''desirable'' positions were included in the Tower Road general merchandise department.

may weigh as much as 100 pounds.[14] The selecting work is very heavy physical work. The stocking work at Tower Road is performed by forklift operators. All witnesses testifying about the stocking and selecting work considered these jobs the least desirable positions at both Tower Road and Preferred Merchandisers. Under the Respondent's proposal, which was accepted by Super Valu, the jobs deemed desirable by the Preferred Merchandisers employees would be assigned to employees in the Tower Road grocery department, except for the sanitation position; there is a separate sanitation department at Tower Road. The forklift work done within the general merchandise department at Tower Road will be performed by grocery department employees.

Super Valu did not agree to Respondent's proposal that all employees could bid for the positions in the new general merchandise department. If this union proposal was accepted, all but four of the Tower Road employees would have seniority over the Preferred Merchandisers employees in bidding for the general merchandise department positions. In order to retain the expertise of the Preferred Merchandisers employees, Super Valu insisted the initial general merchandise jobs be open to bids by Preferred Merchandisers employees only. Inasmuch as the general merchandise department selectors do not have as much heavy lifting as the other departments, it was feared many of the general merchandise positions would be bid on by a sufficient number of Tower Road employees to prevent most if not all Preferred Merchandisers employees from retaining their positions. Whether any of these displaced Preferred Merchandisers employees would have been able to successfully bid on any of the positions vacated due to the Tower Road employees' successful bids was left a matter of sheer speculation. Thus, Super Valu rejected Respondent's proposal. Super Valu also rejected Respondent's proposal the general merchandise wage rate be 85 percent of the Tower Road warehouse rate based on competitive considerations.

C. *September 22 Meeting*

Respondent's representatives, Vairma and Garcia, met with the Preferred Merchandisers employees on September 22 to describe what was occurring in the Tower Road negotiations. Most if not all Preferred Merchandisers employees attended this meeting. By this date, Respondent had made the above-described counterproposal to Super Valu, but Super Valu had not yet indicated its acceptance. According to employee Arnold: ''Well, Steve Vairma said that we would get union seniority, because we only had two years—we had only been in the union two years. And I—there was a mention made about the pay rate of 75 percent.'' The Preferred Merchandisers employees voiced their anger and concern over these proposals and, as Arnold testified, the Preferred Merchandisers employees ''didn't feel that we were being represented.'' Arnold commented during the meeting ''that we were sold out. I didn't think that the union was representing us, and I also said that they were putting Tower Road's union in front of us.'' Vairma replied that was not true. Arnold could not recall Vairma's explanation, if any, of why it was not true. The Preferred Merchandisers employees asked for company seniority.

The meeting concluded with Garcia saying ''that either we take what is in front of us right now, or we don't have a job.'' The choice, as Arnold correctly understood it, was taking union seniority and 75 percent of the Tower Road warehouse rate or not having a job.[15] Garcia did not appear and testify to refute any testimony given by the Preferred Merchandisers employees or corroborate Vairma. His absence was unexplained. Arnold's testimony is credited based on his forthright and candid demeanor. His testimony was corroborated by Bishop who also testified Vairma said the Preferred Merchandisers employees would get only union seniority. Bishop further testified Respondent informed them during the meeting that:

> the [Tower Road] bargaining unit don't want us to have our company seniority, and there was nothing they could do about it.
>
> Q. And did they indicate that they were agreeing with the bargaining committee, that you wouldn't get that seniority, or—
>
> A. Me personally, I understood it that way.
>
> Q. And why were they saying you wouldn't get that seniority?
>
> A. Because the bargaining unit didn't want us to have it.
>
> Q. And why did the bargaining unit not want you to have it?
>
> A. They don't want us to bid on their jobs. They are afraid that we could bump them out of bids.
>
> Q. And did they give any justification for not putting you in a position where you could bump them out of the bids?
>
> A. No.

Bishop also recalled Respondent informing the assemblage they had the choice of taking what is referred to as ''addendum F'' or lose their jobs. Their jobs would be lost, because VARs would be given preference to the Preferred Merchandisers employees. VARs are individuals employed by Super Valu as warehousemen. VAR stands for vacation and absentee replacements. Under the Tower Road collective-bargaining agreement, Super Valu can bring in a VAR in some departments whenever someone is absent from work for any

[14] The selecting at Preferred Merchandisers involved much less ''picking'' of full cases than at Tower Road, but the job was still considered less desirable than the positions that were eliminated from the unit and added to the work performed by the Tower Road employees. The general merchandise order selector picks items that vary from a few ounces to 35–40 pounds. Some displays and other items they pick are heavy, but most of the items picked in the general merchandise department are lighter than those picked in the grocery department. At Preferred Merchandisers, the employees chose the areas they picked, and they generally picked the same area daily. The area selection was based on seniority. This selection was not based on the collective-bargaining agreement, rather it was an established practice at Preferred Merchandisers. There is no showing this practice will continue at the Tower Road facility or that Respondent considered negotiating for this established term and consideration of employment for the Preferred Merchandisers unit members as part of any of the effects or other negotiations.

[15] The record does not clearly establish the Preferred Merchandisers employees were informed by Vairma they would be limited to the stocker and selector positions in the Tower Road general merchandise department.

reason. VARs have the right to bid on vacancies and they are accorded seniority based on their length of service with Super Valu.

Respondent and Super Valu agreed upon addendum F to the Tower Road collective-bargaining agreement as the method of combining Preferred Merchandisers and Tower Road operations. Addendum F to the Tower Road contract, executed and effective September 13, 1992, provides:

> In the event the Employer relocates its General Merchandise Operation to the Tower Road facility and those employees become part of the bargaining unit covered by this collective Bargaining Agreement, a new department of General Merchandise shall be established.
>
> The current employees at Preferred Merchandisers shall have their union seniority dovetailed with the employees covered by this agreement and shall be immediately covered by its terms and conditions. The top rate of pay for employees working in General Merchandise shall be seventy-five percent (75%) of the warehouse classification rate and the wage progression shall be applied to the rate determined using this formula.
>
> General Merchandise Department job bids shall be limited to stocker and selector in the General Merchandise Department only.
>
> Employees presently performing the General Merchandise work at Preferred would by seniority be placed into any job openings that exist in the newly created General Merchandise Department; at the time of the move. Openings created after the move is completed shall be awarded based on the bid procedure in Article 3[16] of this agreement.

Vairma claimed his and the bargaining committees' posture during the Tower Road negotiations was not based on a concern the Preferred Merchandisers employees may exercise any seniority over them. He did admit, however, he was convinced the Tower Road employees would reject out of hand any collective-bargaining agreement that dovetailed the Preferred Merchandisers employees' Company seniority with the Tower Road employees' company seniority. Also, credited Preferred Merchandisers employees testified seniority was a consideration in the Tower Road negotiations of addendum F. Moreover, after being referred to his affidavit, Vairma admitted the Tower Road bargaining committee did not want to grant the Preferred Merchandisers employees ''almost the Super seniority status; they had only been members since that contract was ratified, and that prior to 1991, they had no seniority.'' Vairma also recalled making the following statements in his affidavit: that ''the [Tower Road bargaining] committee's concern was that the Preferred people should not exercise seniority over them'' and ''[i]nstead of giving Preferred people extra seniority, the Super Valu committee felt they should carry their union seniority, since they had only been in the union for a short period of time.'' This admission buttresses Bishop's testimony concerning Respondent's agent's statement during the September 22 meeting, related above. Accordingly, I conclude the Tower Road unit's concerns regarding their having seniority superior to the Preferred Merchandisers unit employees was a consideration in the negotiations of addendum F.

D. *Tower Road Negotiations After the September 22 Meeting*

Although Respondent knew the Preferred Merchandisers employees were unhappy with the Tower Road proposals, there was little if any change in Respondent's bargaining position. Vairma did not acknowledge he had any specific duty to the Preferred Merchandisers employees in the Tower Road contract negotiations. There is no indication Respondent informed the Tower Road bargaining committee or Super Valu of the views of the Preferred Merchandisers employees as related to Respondent in telephone conversations, in person at the September 22 meeting, or otherwise. Respondent did not alter its proposals in the Tower Road negotiations to reflect the stated concerns of the Preferred Merchandisers employees.

On September 23, Respondent accepted Super Valu's counterproposal. The accepted counteroffer established the general merchandise department stocker and selector positions were to be initially filled by bids limited to Preferred Merchandisers employees. This proposal was consonant with the Employer's initial proposal that expressed its desire to have Preferred Merchandisers employees initially fill the general merchandise department jobs. Any future openings would be subject to the Tower Road collective-bargaining agreement's bid procedures. The Employer also proposed the general merchandise employees receive a wage rate that was 75 percent of the warehouse wage rate. Respondent accepted these counterproposals and the Tower Road employees overwhelmingly ratified this agreement.

E. *Events Subsequent to Negotiations*

On February 23, 1993, the charge was filed. On April 1, 1993, Super Valu informed the Respondent it decided to move the Preferred Merchandisers general merchandise operation to Tower Road and requested a meeting with the Union and representatives of both the Preferred Merchandisers and Tower Road units ''to discuss details associated with the upcoming move.'' By letter dated April 12, 1993, Super Valu modified its April 1 letter to ''reflect the closure of Preferred Merchandisers, rather than its move. . . . Representatives of SUPERVALU wish to meet with Union representatives from both facilities as well as the Local to discuss details associated with the upcoming move.''

Respondent, by letter dated May 4, 1993, asked for clarification of the Super Valu's April 12 letter. The Union asked confirmation of its understanding that Super Valu's action is a closure and termination rather than a merger of the Preferred Merchandisers and Tower Road ''operations, facility and bargaining unit.'' Respondent further requested, in the event it correctly understood Preferred Merchandisers was being closed, to bargain about the effects of such closure and ''Local 435 will insist upon compliance by SUPERVALU Denver Division with Section 1.02 as well as any other terms

[16] Art. 3 of the Tower Road collective-bargaining agreement provides, in part:

> 3.01 Seniority shall be defined as length of continuous service of regular full-time employees within the bargaining unit. On layoffs, transfers, job bidding, recalls, and promotions, the principle of seniority shall apply, providing qualifications are relatively equal.

of the [Preferred Merchandisers] collective-bargaining agreement which apply to such closure.''

If Respondent insisted on the application of Section 1.02 of the Preferred Merchandisers collective-bargaining agreement, then the provisions of addendum F to the Tower Road collective-bargaining agreement would not be applied to the Preferred Merchandisers employees when the general merchandise operation was commenced at Tower Road. The result of this request by Respondent would be to render inoperative any of the favorable bidding rights negotiated by the Employer for the Preferred Merchandisers employees in its last counteroffer and reduce these employees rights to probable layoff and preferential hiring over new hires only.

Super Valu wrote Respondent on May 18, 1993, explaining its intent to terminate the operations of ''the legal entity 'Preferred Merchandisers' . . . and [t]he work being performed at Preferred Merchandisers, however, will be moved to the Tower Road facility some time in June or July.'' The Employer also indicated its continuing willingness to negotiate with Respondent and announced its intent to follow the provisions of both the Tower Road and Preferred Merchandisers collective-bargaining agreements.

In mid-June 1993, Respondent, by Garcia, Vairma, and its General Counsel, Gene Duran, met with the employees of Preferred Merchandisers. Almost all the Preferred Merchandisers unit employees attended the meeting. According to Vairma, Respondent informed the Preferred Merchandisers employees they were there to vote on the ''effects''; to accept either the agreed-to addendum F to the Tower Road collective-bargaining agreement or article 1.02 of the Preferred Merchandisers collective-bargaining agreement. Vairma admitted the employees wanted an option not afforded by the choices presented by the Union, ''[t]hey wanted to be able to have the right to be able to bid on two jobs over at Tower Road if jobs started coming up or being available during all of this transfer.'' Vairma also admitted VARs could and did pass the Preferred Merchandisers employees up preceding the move.

Arnold corroborated some of Vairma's testimony. According to Arnold, the Preferred Merchandisers employees were given the choice of accepting preferred hiring under their contract or the limited bidding for general merchandise department positions at Tower Road as provided in addendum F to the Tower Road collective-bargaining agreement. Arnold informed Respondent's representative that the Preferred Merchandisers employees were ''between a rock and a hard place'' and they did not ''like either place.'' Arnold requested that the Preferred Merchandisers employees be accorded company seniority. According to Arnold, Vairma and Roman said, ''They wouldn't discuss it. They said we were here for one reason, one reason only, to vote.''

Arnold admitted the effects of their options were fully discussed by Respondent's representatives during the meeting, and the employees were permitted to express many of their objections to these options. Arnold testified in an open and honest manner; he appeared to be trying to testify truthfully and his testimony is credited. I therefore find Respondent precluded the Preferred Merchandisers employees from discussing any other alternatives at this meeting. All but one of the Preferred Merchandisers employees voted to accept addendum F, and the one remaining employee abstained. Arnold explained addendum F was better than article 1.02 of the Preferred Merchandisers collective-bargaining agreement.

The day after the June meeting with Preferred Merchandisers employees, Respondent met with Super Valu to bargain about the effects of the move. The agreement provides for severance pay, allowing the employees who so choose, to have their union seniority dovetailed with the Tower Road employees pursuant to the provisions of addendum F, and continued coverage under the current benefit plans. The agreement also provided:

> Employees will be allowed to bid on any job vacancies at the . . . Tower Road facility based upon their union seniority prior to the move to . . . [Tower Road] on jobs not filled through the . . . [Tower Road] Collective Bargaining Agreement prior to offering full-time position to the current VAR's or prior to hiring from outside.

There was no provision in this agreement which would give the Preferred Merchandisers employees preference in bidding prior to the move over the four less senior Tower Road employees currently employed full time in the grocery department.

F. *Effects of Combining the Units Without Dovetailing Company Seniority*

Respondent admitted the combined unit, including the stockers and selectors in the new general merchandise department, is appropriate for the purposes of collective bargaining as defined in Section 9(a) of the Act.[17] The combination of the units had not been completed at the time of the instant hearing. The move of Preferred Merchandisers operations to Tower Road had been in progress during July 1993 and was scheduled to be completed the Monday following this hearing. The 27 Preferred Merchandisers employees had not yet bid on the 14 to 18 stocker and selector jobs estimated to be available in the general merchandise department at Tower Road.

The remaining positions involved in the operation of the general merchandise department, including forklift operators, receivers, checkers and salvage, will be open to bid by Grocery department employees. Since bidding at Tower Road gives department employees preference, all grocery department employees have preference over any of the Preferred Merchandisers employees in bidding for these jobs.

As of the day of this hearing, the combining of the units has directly led to the addition to the grocery department of two forklift positions, two receiver positions, one inventory checker job, and one salvage position. These openings, with the exception of the salvage job,[18] were only posted in the Tower Road grocery department, none were posted at Pre-

[17] The parties stipulated the following in the appropriate unit:

All warehousemen, checkers, drivers, maintenance mechanics, garage helpers, sanitation employees employed by the employer at its Tower Road warehouse facility in the grocery warehouse, perishable warehouse (meat, dairy, produce, frozen food), transportation, garage, maintenance, sanitation and general merchandise departments, but excluding office clerical employees and all guards and supervisors as defined in the Act.

[18] The salvage position was opened the afternoon before this hearing and it was not known if it had been posted for bidding.

ferred Merchandisers, so any employees still working at Preferred Merchandisers, which is most of them, did not have notice or an opportunity to bid. One Preferred Merchandisers employee, Nicholoff, while temporally assigned to work at Tower Road, did sign up for a grocery department position, but his name was crossed off the bid sheet by an unknown person. There was no clear explanation of why the bids were not posted at Preferred Merchandisers and why the Preferred Merchandisers employee's name was crossed off the bid sheet.

As counsel for the General Counsel noted, the posted bids for forklift drivers were not yet awarded. The two receiving checker positions were awarded to grocery department employees, one with a May 30, 1986 hire date, and the other with a May 12, 1986 hire date. The successful bidder for the inventory checker had a hire date of August 4, 1986. If the Preferred Merchandisers employees were able to retain their company seniority, Nicholoff, with a hire date of December 28, 1985, would have been senior to the successful bidders for these positions. If Nicholoff could have retained his company seniority, the seniority lists had been dovetailed, as Super Valu initially proposed, and if the positions had not been removed from the general merchandise department, Nicholoff probably would have been successful in obtaining one of these positions. The two forklift positions had not been awarded at the time of the conclusion of this hearing, but the bid sheet, as of July 29, 1993, was signed by several grocery department employees whose hire dates were later than some Preferred Merchandisers employees.

Tony Tipton, Super Valu's current director of human resources at the Denver division, testified that under addendum F, which gives Preferred Merchandisers employees only union seniority and the fact these new positions were posted as grocery department jobs, it was highly unlikely any Preferred Merchandisers employees could successfully bid for any of these newly created positions because of departmental preference. As Tipton acknowledged, any grocery department employee has preference in bidding for any grocery department position over any general merchandise department employee, regardless of seniority.

The jobs transferred to the grocery department from the Preferred Merchandisers operations, as noted above, are considered the more desirable jobs, for they do not involve bending and lifting. Accordingly, I find it is highly improbable that any general merchandise department employees, i.e., the former Preferred Merchandisers employees, could successfully bid for any of these preferred positions while working in the general merchandise department. In order to position themselves for these favored positions, the general merchandise department employees would probably have to bid on a grocery selector position in the grocery department. These positions require lifting heavy objects and are considered less desirable positions than those transferred to the grocery department from the Preferred Merchandisers operation under addendum F. Another inhibiting factor in the Preferred Merchandisers employees' ability to bid for other positions in the grocery department is they will be junior to almost all the grocery department employees.

The operations of the general merchandise department at Tower Road has not been shown to require operation by grocery department employees at all positions except order selectors and stockers. Mary Portz, who was a receiver-checker at Preferred Merchandisers, was temporally assigned to Tower Road to help train the two new receivers, Gary Schultz and Anthony Barela, and others in receiving products for the general merchandise department. Super Valu has two different scheduling clerks; as here pertinent, one for the general merchandise department and the other for the grocery department. There clerks were not alleged to work together, even when trucks loaded with both grocery and general merchandise items are scheduled to arrive at Tower Road. There was no explanation why Super Valu used a different receiving clerk for grocery items than it did for general merchandise. There was no claim these positions could have been combined.

According to Portz, the general merchandise is scheduled to arrive at loading docks close to the general merchandise department and grocery items were scheduled to arrive at different docks, even if they are on the same truck. Tipton contradicted Portz, but there was no showing he was ever present at Tower Road when it operated with trucks arriving with both grocery and general merchandise items. The general merchandise scheduling clerk was the same individual who performed that job at Preferred Merchandisers. Portz was training the new receiving clerks in checking the general merchandise shipments because:

> We check a little differently than they do. We deal a lot more in the breakdown pack sizes of the product, where they deal in full cases, and we have to make sure that when they are checking in product, if there is damage or overage that they correctly fill out the paperwork.

Portz's rate of pay as a receiver/checker at Preferred Merchandisers was $9.63 an hour until the beginning of the move when she began earning $10.31 an hour. She had been an alternate steward at Preferred Merchandisers. She appeared honest and direct in her testimony. Based on her demeanor, I conclude she is a credible witness. No witness who was present at Tower Road at the same time Portz was training the receiving clerks refuted her testimony. Accordingly, I conclude there is no credible evidence the general merchandise department receiving functions have been commingled and/or joined with the grocery department receiving operations.

Buttressing this conclusion is the testimony of Allen Arnold, a Preferred Merchandisers order selector who has been working at Tower Road setting up the general merchandise department the week of the hearing. Arnold noticed the general merchandise department's merchandise arriving ''at the doors right in front of our [general merchandise] area.'' He candidly admitted general merchandise could have been unloaded at other doors. There were no employees, however, who were engaged in the receiving operation that testified general merchandise was received at other locations or that grocery items were received at the four doors in front of the general merchandise department.

Arnold also observed two forklift drivers working exclusively in the general merchandise department; these drivers arrived before he did and remained after Arnold completed his working day. There was no dispositive evidence these forklift operations would change once the move of Preferred Merchandisers was completed. Again, there were no employ-

ees working in either the grocery department or the general merchandise department that refuted or contradicted Arnold's testimony. I credit Arnold based on his extremely candid demeanor.

III. CONTENTIONS, ANALYSIS, AND CONCLUSIONS

Respondent denies breaching its duty of fair representation to the Preferred Merchandisers unit and asserts as affirmative defenses: (1) the allegations contained in the complaint do not constitute a prima facie showing of a breach of the duty of fair representation; (2) Respondent has not breached the duty of fair representation and has acted in good faith to represent any and all its members; (3) the Board has acted in an inappropriate manner by interfering in the relationship a union has with its members due to a charge filed by one individual. Local 435 voted all employees at both the Tower Road facility and Preferred Merchandisers on each collective-bargaining agreement, yet one individual is attempting to dictate to all employees the manner of allocating seniority; and, (4) the entire matter has become moot because the Preferred Merchandisers unit has voted and ratified addendum F. Respondent requested dismissal of this proceeding. Ruling on this motion was deferred until resolution of the factual and legal issues in this decision. Based on my consideration of the evidence, briefs, and case law, I conclude the motion to dismiss should be, and it is hereby, denied.

Counsel for the General Counsel avers Respondent did not seek to represent all employees in the combined unit with the singleness of purpose required of an exclusive bargaining agent. Rather, the singleness of purpose demonstrated by Respondent was the claiming of the ''spoils'' by the Tower Road unit, when the opportunity arose by the combining of the two previously separate units.

A pivotal decision in determining a union's obligations in collective bargaining is *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), which held:

> [A]s the exclusive bargaining representative of the employees in [the] bargaining unit, the Union had the statutory duty to fairly represent all of those employees, both in its collective bargaining with [the employer], see *Ford Motor Co. v. Huffman*, 345 U.S. 330; *Syres v. Oil Workers International Union*, 350 U.S. 892, and its enforcement of the resulting collective bargaining agreement, see *Humphrey v. Moore*, 375 U.S. 335. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see *Steele v. Louisville & N.R. Co.*, 323 U.S. 192; *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, and was soon extended to unions certified under the N.L.R.A., see *Ford Motor Co. v. Huffman*, supra. Under this doctrine, the exclusive statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Humphrey v. Moore*, supra at 342.

The Board held in *Miranda Fuel Co.*, 140 NLRB 181 (1962), enfd. denied 326 F.2d 172 (2d Cir. 1963), that a union's breach of its duty of fair representation owed to employees in the unit it represents is an unfair labor practice. The Supreme Court in *Vaca v. Sipes*, supra at 177–178 (sub silentio), approved the Board's *Miranda Fuel* holding; and it has been regularly applied by the Board and the courts. See *Branch 6000 v. NLRB*, 595 F.2d 808, 811 fn. 13 (D.C. Cir. 1979); *Teamsters Local 814 (Beth Israel Medical)*, 281 NLRB 1130, 1146 fn. 74 (1986), in which the Board referred to its *Miranda Fuel* decision stating:

> Viewing these mentioned obligations of a statutory representative in the context of the ''right'' guaranteed employees by Section 7 of the Act ''to bargain collectively through representatives of their own choosing'' we are of the opinion that Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.

See further *Vaca v. Sipes*, supra, 386 U.S. at 186.

Respondent argues there was no violation of the duty of fair representation for its conduct was not ''arbitrary, discriminatory, or in bad faith,'' id. at 190. In *Ford Motor Co. v. Huffman*, 345 U.S. 331, 338–339 (1953), the Supreme Court determined the bargaining representative, ''is responsible to, and owes complete loyalty to, the interests of all it represents.'' The Court further remarked:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining agent in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise on its discretion.
>
> Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in the course of service, and the time or labor

> devoted to related public service, whether civil or military, voluntary or involuntary.

The General Counsel bases its case on the claim Respondent failed to meet its duty of fair representation to all the employee in the new Tower Road unit. I find this argument is persuasive based on the facts of this case. Clearly, Respondent agreed to base the Preferred Merchandisers employees' new seniority on the length of their representation by the Union. As the the Board held in *Glass & Pottery Workers (Anchor Hocking Corp.)*, 255 NLRB 715 (1981):

> We agree with the [Administrative Law Judge's] finding that the new system is unlawful since it is . . . based on length of union membership. . . . A Union is free at any time to negotiate a change in a seniority system as long as in doing so it complies with its duty to fairly, impartially, and in good faith represent all of the employees in the unit.

Respondent negotiated addendum F to favor the Tower Road unit members in the anticipated event the Preferred Merchandisers unit members became a part of the Tower Road unit. It based this favoritism in addendum F on the length of the Preferred Merchandisers employees' length of union representation at Preferred Merchandisers. Vairma admitted in his affidavit:

> ''they'' [the Tower Road bargaining committee] didn't want to grant them [the Preferred Merchandisers unit] almost the Super seniority status; they had only been members since that contract was ratified, and that prior to 1991, they had no [union] seniority. . . . Instead of giving Preferred people extra seniority, the Super Valu committee felt they should carry their union seniority, since they had only been in the union for a short period of time.

Respondent failed in this case to establish it met the standard of fair representation described in *Ford Motor Co. v. Huffman*, supra, by demonstrating it was responsible to and met is obligation of loyalty to the members of the Preferred Merchandisers unit. There was no claim Respondent computed the seniority of the Tower Road grocery department employees in a similar manner. The Tower Road collective-bargaining agreement bases seniority upon length of service within the bargaining unit, not union membership. Even assuming a similarity in methods of calculating seniority, the Tower Road unit has been reresented by Respondent since the 1940s; thus, to calculate seniority on union representation or the date of the first collective-bargaining agreement covering the involved employees, sends the Preferred Merchandisers employees the clear and proscribed message they were being adversely discriminated against because they exercised their rights under Section 7 of the Act by voting against the Union in 1988. To base seniority on this reason exceeds the wide range of reasonableness granted an exclusive collective-bargaining representative. *Glass & Pottery Workers (Anchor Hocking Corp.)*, supra.

Respondent's actions were not shown to be based on a compromise ''with a view to long range advantages [that] are natural incidents of negotiation.'' *Ford Motor Co. v. Huffman*, supra at 339. Respondent failed to demonstrate giving the Preferred Merchandisers employees seniority from the date the Union contracted with their employer was based on any differences such as ''the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in the course of service, and the time or labor devoted to related public service, whether civil or military, voluntary or involuntary.'' Id.

In *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB 974 (1986), it was found the union failed to present justification for its endtailing positions even though the union's actions did not spring from hostile motives. The Board affirmed the holding that a union could not refuse to negotiate for dovetailing two units it represented solely because one unit had become represented by the union after the other or for the unit members prior exercise of their right to refrain from engaging in union activity. Like the situation herein, in *Daly, Inc*., supra, a unit of former unrepresented employees was recently organized by the union and then the employer consolidated this unit with a unit that was organized for a longer period of time. The Union's argument for endtailing was rejected by the Board ''because the represented employees at both locations formed one new unit at the time they moved simultaneously into the [new] facility.''

I find Respondent's argument the *Daly, Inc*. case is inapplicable because Super Valu closed the Preferred Merchandisers facility rather than merged two units unpersuasive. Respondent represented both units and knew of the prospective combination of these units at the time it negotiated the Preferred Merchandisers agreement and addendum F. The decision of Super Valu to close the Preferred Merchandisers facility, rather than merge the units, was not known to Respondent until well after it negotiated addendum F. The Super Valu decision to close Preferred Merchandisers and combine the units into one unit does not privilege an exclusive collective-bargaining representative to use this subsequent decision to justify entering into a written agreement that discriminated against the Preferred Merchandisers unit because of the recency of their union membership. This type of discrimination is proscribed by Section 8(b)(1)(A) of the Act regardless of whether the Employer's actions are deemed either a merger or a closure and consolidation. Respondent cannot act in a discriminatory manner toward a unit it represents due to size because they are consolidated with another larger unit and their facility is closed rather than merged with another facility. Moreover, *Daly, Inc*., supra, does not require the Union to intend a particular result, merely that Respondent refrain from such discrimination based on size of the unit and/or a unit's exercise of their Section 7 right to refrain from the Union's representation, as was the case here in 1988.

Super Valu offered to dovetail the Preferred Merchandisers and Tower Road units, it was the Union which insisted on what to all intents and purposes was endtailing of the smaller unit. Respondent admitted the small size of the Preferred Merchandisers unit was a definite consideration in its decision to require the endtailing of the Preferred Merchandisers unit members in addendum F. Respondent's counsel admitted ''The union had the interest of over 200 employees and the interest of under 30 employees.''

In *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976), the court of appeals found:

> In summary, since the established seniority rights of a minority of the Barton employees have been abridged by the 1972 collective bargaining agreement for no other apparent reason other than political expediency, there seems to be sufficient grounds in this case to support the Board order. . . . In making its determination, the Board should consider that in order to be absolved of liability the Union must show some objective justification for its conduct beyond that which of placating the desires of the majority of the unit employees at the expense of the minority.

Although the court's opinion was followed only as the law of the case, the Board determined in the underlying decision, *Barton Brands, Ltd*., 213 NLRB 640 (1974), that the union did not demonstrate good faith or honesty of purpose for the union agent indicated his purpose was to:

> enhance his own political objectives. Moreover, he stated categorically that he had no obligation to represent the former Glencoe employees even though they were in the bargaining unit. In view of the foregoing, we find that the Union transgressed the ''wide range of reasonableness'' accorded a statutory bargaining representative in serving the unit it represents.
>
> An elected Union official, doubtless has a need to develop and maintain his constituency, like any politician in any other context. However, as a union official, he is under a statutory duty to see all employees are fairly represented, and he may not lawfully violate that duty by causing interference in the employment relationship of any employees in the unit upon arbitrary grounds solely to advance his own personal political ambition within the Union.

Similarly, Respondent cannot abandon its obligations to represent both units to the will of the majority unit. If I were to accept at face value Vairma's representation that he merely adhered to the will of the Tower Road unit representatives during negotiations of addendum F, and he was not concerned with the impact of their majority position, Respondent still did not meet its duty of fair representation to the members of the Preferred Merchandisers unit. At the very least Respondent had the duty to advance the different interests of the Preferred Merchandisers unit in negotiating addendum F. As the Board held in *Teamsters Local 315 (Rhodes & Jaimeson)*, 217 NLRB 616, 619 (1975):

> The duty of fair representation being an affirmative duty, the obligations it encompasses cannot be avoided by delegating the authority to make decisions. Here the Union in effect delegated this authority to a group of its members. It could not, however, abdicate the responsibility for fair treatment of employees affected by the decision. By selecting the method for determining its action the Union underwrote the fairness of the method.
>
> The duty of fair representation was conceived as a protection for employees faced with the reduction of their individual rights corresponding with the grant of power to unions to act as their exclusive collective-bargaining representatives. Since its conception this duty ''has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.'' Were it held powerless to protect the employee in this case, where the Union permitted, in the exercise of its power, what would be only a slight exaggeration to call a mockery of fair procedures, this bulwark will have proved to be as illusory as the Maginot Line.

Analogously, Respondent, by Vairma, informed Bishop and other Preferred Merchandisers unit members, the negotiations for addendum F did not concern them and Bishop or any other member of the Preferred Merchandisers unit could not attend the negotiations involving addendum F. Vairma's action was not shown to be Respondent's established practice. Vairma permitted a member of the Tower Road unit to attend the negotiations for the Preferred Merchandisers collective-bargaining agreement. Compare *Riser Foods*, 309 NLRB 635 (1992), wherein Judge Robert Romano distinguished the *Daly* and *Barton Brands* cases, supra, on the basis the union in these cases had insisted on endtailing the members of a disadvantaged unit after the union had become the exclusive collective-bargaining representative of the employees in both units.

In *Riser*, the union did not represent one group of employees, thus it did not have an obligation to protect the unrepresented employees. In contrast, Respondent here had an obligation to represent both units fairly and at the least, advance the interests of the Preferred Merchandisers unit while negotiating the effects of the proposed consolidation in the Tower Road collective-bargaining agreement. Respondent admittedly failed to meet this obligation, and instead capitulated entirely to the will of the Tower Road unit deeming the interests of the Preferred Merchandisers employees uninvolved and superfluous. Respondent has not shown negotiating addendum F on the basis initially offered by Super Valu to include dovetailing of company seniority was a fruitless act. Vairma or any other representative of Respondent did not claim they spoke to the Tower Road negotiating committee about dovetailing company seniority and then determined seeking such a provision was a fruitless act. Respondent has failed to substantially justify its failure to attempt to negotiate dovetailing. *Glass & Pottery Workers (Anchor Hocking)*, supra, 255 NLRB at 720.

As the Board held in *Teamsters Local 315*, 217 NLRB at 617:

> When a majority of this Board decided, in *Miranda Fuel Company, Inc*., 140 NLRB 181 (1962), that a union's breach of its duty of fair representation constituted a violation of Section 8(b)(1)(A) and, under certain circumstances, Section 8(b)(2) of the Act, it also spelled out to some extent its understanding of that duty. As the Supreme Court noted in *Vaca v. Sipes*, 386 U.S. 171, 181 (1967), the Board had adopted and applied the doctrine of the duty of fair representation as developed by the Federal courts. Pertinent to the instant case, the Board adopted the concept, quoted from an opinion of the United States Court of Appeals for the District of Columbia Circuit, that the duty is ''in a sense fiduciary in nature.''
>
> Whatever the precise outlines of this duty, a subject of scholarly debate of long standing, its fiduciary nature connotes some degree of affirmative responsibility with

> regard to the allocation of benefits the union secured for employees in a collective-bargaining agreement. At least as to rights under an existing agreement, the duty of fair representation is more than an absence of bad faith or hostile motivation. So much is implicit in *Miranda Fuel* itself, where the majority found a breach of the duty because the union caused the forfeiture of an employee's seniority status, to which he was entitled under the contract, and the union's action was based on pressure asserted by other employees to persuade it to do so.[19] There was no finding of hostility toward the employee affected, of bad faith in the union's assertion of its erroneous contract interpretation (although the facts might have justified such a finding), or of any other unlawful motivation on the part of the union. The union's violation consisted simply, in the words of the Board majority, in violating the employee's ''right to fair and impartial treatment from his statutory representative.''
>
> Another way this elusive element of the duty of fair representation has been authoritatively described is the avoidance of arbitrary conduct. [*Vaca v. Sipes*, supra at 177.] Here again, although phrased in negative terms, the duty is to some extent an affirmative one, for a common characteristic [of] arbitrariness is the *absence* of some ingredient in the decision making process.

The reasons Vairma gave the Preferred Merchandisers employees and Respondent's admitted preference of and difference to the much larger Tower Road unit in negotiating the effects of the consolidation of units in addendum F, rather than substantially justify its actions, demonstrates under established Board law, the arbitrary nature of its actions. The Union failed to take action on behalf of the Preferred Merchandisers unit, rather it deferred entirely to the actions of the Tower Road units representatives on the bargaining committee. Clearly, Respondent has failed to act ''affirmatively'' in meeting its duties toward the Preferred Merchandisers employees, a unit it represents. See *Barton Brands* and *Daly, Inc*., supra.

The impact of Respondent's failure to represent stated as well as inherent interests of the Preferred Merchandisers employees during negotiations of the Tower Road collective-bargaining agreement and the other actions it took to advance on the Tower Road units interests, resulted in the Preferred Merchandisers employees having a greater chance of being laid off and/or a lack of the facility to realistically follow many of their jobs, including the most desirable positions, such as forklift operator and receiver. Only the most physically onerous positions were left for the Preferred Merchandisers employees. The results of Respondent's proposal to take these desirable positions from the general merchandise department probably also occasioned more Preferred Merchandisers employees being laid off; for all but one those positions were assumed by grocery department employees. Respondent recognized the impact of its proposals to Super Valu on the Preferred Merchandisers employees yet deferred entirely to the wishes of the Tower Road employees without any representation of the interests of the Preferred Merchandisers employees. Respondent has not demonstrated it was ''powerless to protect the [Preferred Merchandisers] employees in this case, where the Union permitted, in the exercise of its power, what would be only a slight exaggeration to call a mockery of fair procedures . . . .'' Id. at 619.

Respondent argues the Preferred Merchandisers employees could bid for jobs outside the general merchandise department. Initially, addendum F precludes Preferred Merchandisers from successfully bidding on the positions transferred to the Tower Road grocery department. The loss of company seniority and the preference given to the grocery department bidders works to foreclose any real opportunity for Preferred Merchandisers employees to successfully bid for these positions. The reality of the Preferred Merchandisers employees' position was acknowledged by the failure to post the bids at Preferred Merchandisers.

I also find to be without merit in this case Respondent's argument that it met its duty of fair representation to the Preferred Merchandisers employees by allowing them to vote for the Preferred Merchandisers collective-bargaining agreement and addendum F. Respondent took the vote on addendum F after it was negotiated and implemented. The choice afforded the Preferred Merchandisers employees was to take lesser seniority and the least desirable jobs in the general merchandise department or risk probable layoff with the right of preferred recall. As these employees testified, they chose the lesser of two evils.

Inasmuch as the Preferred Merchandisers employees were presented with a fait accompli, their actions by voting for the lesser of two evils cannot be construed as a waiver. These actions are not appropriately considered as subject to waiver.[20] Further, Respondent argues the Preferred Merchandisers employees' votes render the complaint moot. For the same reason this vote cannot be considered a waiver, the vote does not render these employees right to fair representation

[19] The Board added a footnote at this point stating ''We are not concerned with the standards of fairness to be applied with regard to contract negotiations.''

[20] I also find the Preferred Merchandisers employees did not waive their rights to fair representation in the negotiations of the Preferred Merchandisers collective-bargaining agreement by their ratification of that agreement. As Bishop testified without refutation, the Preferred Merchandisers unit tried to bargain taking company seniority with them in the event of a move as follows:

> Q. Do you remember ever discussing with union officials during those negotiations how your seniority would be fit in with Tower Road if the two facilities were—if the two warehouses were put together?
>
> A. I understood that we would just take it with us.
>
> Q. Did you request to negotiate something like that in your contract in 1991?
>
> A. Yes, we did.
>
> Q. What did the union say about negotiating that kind of language?
>
> A. That we shouldn't have it in our contract.
>
> Q. Why?
>
> A. He figured that we might do better if we did it when they were closer to doing the move.
>
> Q. Who said that?
>
> A. Steve Vairma.

The acquiescence of the Preferred Merchandisers employees to defer such negotiations cannot and will not be construed as a waiver of any rights to later bargain about such issues, because in this case, Respondent represented it would benefit this unit to defer such negotiations and they apparently relied on this representation.

moot.[21] At the time of the Preferred Merchandisers collective-bargaining agreement the Union refused to negotiate the seniority issue. It cannot now argue that the Preferred Merchandisers employees waived their right to such negotiations during collective bargaining 2 years before the consolidation and with the Union's refusal to seek such protection when asked during the 1990 negotiations. Respondent clearly inferred Preferred Merchandisers employees would be afforded the opportunity to negotiate the effects of any consolidation on their seniority at a time more proximate to any merger or consolidation. Clearly, they were not afforded this opportunity prior to or at the time of the consolidation. The facts conclusively require a finding there was no knowledgeable waiver of the right to bargain about seniority, job retention, or other terms and conditions of employment by the Preferred Merchandisers unit members.

Moreover, the Preferred Merchandisers employees were not afforded any opportunity to participate in negotiations of choices other than addendum F to the Tower Road agreement and article 1.02 of the Preferred Merchandisers collective-bargaining agreement. When the Preferred Merchandisers employees sought to retain their company seniority, Respondent informed them they could not negotiate the matter or any other matter involving the consolidation, they had only the two choices. Since there were no negotiations involved in this employee vote they could not be found to have waived any rights to negotiate. The lack of any opportunity for such participation is one of the basis for my decision Respondent abandoned its obligation to fairly represent the Preferred Merchandisers unit.

Another reason Respondent advanced for its actions was it was merely deferring to Super Valu's request to limit the general merchandise department to the stocker and selector classifications. This argument is also without merit. Super Valu did not insist on such a limitation.[22] As previously noted, the Employer initially requested the general merchandise department be moved in its entirety to Tower Road and seniority be dovetailed. The limitation of the general merchandise department to stockers and selectors was part of a counterproposal made by the Union in response to the Employer's stated need to have experienced employees in the general merchandise department. The Employer did not limit the need for experienced employees to the positions of stocker and stocker. I conclude the Union again acquiesced to the desires of the then Tower Road unit to gain as much as possible from the situation during these negotiations, without regard to any of the interests of the Preferred Merchandisers employees. Again, Respondent merely acquiesced to the larger unit's desires without any representation of the smaller unit members' interests.

Respondent did attempt to get the general merchandise department employees' wage rates more comparable to those in the grocery department, however, this was accompanied by the proposal these positions be opened to bid to all Tower Road unit employees, most of whom had seniority over the Preferred Merchandisers employees. In every way, Respondent failed to advocate any of the interests of the Preferred Merchandisers employees. Super Valu's Tipton testified the forklift jobs could have been assigned to Preferred Merchandisers employees in the general merchandise department, for the Employer considers: ''Given the nature of the job, really a forklift person could be required to be anywhere, as far as receiving the product. As a matter of fact, we have had long discussions on preferential jobs within a bid, and again, it is the company's contention that once you are a forklift operator, you can be a forklift operator anywhere within the grocery department, of course.''

As previously noted, the Union is processing grievances on this position and has not accepted Super Valu's views on this point. Thus, with the different wage scale and job bidding procedure, Respondent cannot reasonable argue it was merely accepting Super Valu's position on the forklift, receiver, checker, and other jobs removed from the general merchandise department and given to the grocery department employees. Both Respondent and Super Valu admitted grocery department forklift drivers do not work in any department other than the grcoery department. For example, they do not work in the perishable foods department, except in overtime situations where perishable foods department forklift drivers do not want to work overtime or other rare occurrences. Respondent did not disavow the grievances or the principal that employees cannot be routinely assigned to work in other departments on an as needed basis by Super Valu. The Union did not accept Super Valu's position that a forklift driver is a forklift driver who can be assigned to any department at any time. The grievances are still pending; the Union has not withdrawn them or indicated a change in its position. The only time the Union acquiesced to forklift drivers regularly working in another department was for the grocery department employees to take the general merchandise department positions, which were the Preferred Merchandisers unit members' jobs.

Respondent's proposal to limit the general merchandise department positions to stocker and selectors cannot be argued as an effort to retain positions for Preferred Merchandisers unit employees, for the Union also proposed these po-

[21] Respondent avers the Preferred Merchandisers employees were permitted to discuss the two alternatives given them by the Union, addendum F, or art. 1.02 of the Preferred Merchandisers collective-bargaining agreement. They were not permitted to negotiate for any matters effecting them from the consolidation of the units; their request for retention of seniority during the Preferred Merchandisers collective-bargaining agreement negotiations was deferred by Respondent, and they were not permitted to participate directly in either the negotiation of addendum F or in the effects bargaining. Accordingly, I find this claim by Respondent to be without merit.

[22] As Vairma admitted, the only position Super Valu stated was to be eliminated from the general merchandise department was the clerk, because it was consistent with the Tower Road unit, which had no clerical positions. Other than the clerical position, Super Valu did not propose the elimination of any other position from the general merchandise department. The Employer did envision the operation of the general merchandise department as a mezzanine section which would not require full-time forklift operators, but there was no request to take what eventuated to full-time forklift operations in the general merchandise department and assign them solely to grocery department employees. Further, Respondent failed to explain what in Super Valu's vision of the operations required the elimination of the receiving, checking, salvage, and other positions from general merchandise department employees and giving them to grocery department employees. Again, Respondent failed to take any action, and no reason, other than deference to the larger Tower Road unit, was advanced as the basis for the Union's failure to represent in any manner the interests of the Preferred Merchandisers employees.

sitions be open to an initial warehousewide bid,[23] in further derogation of the Preferred Merchandisers employees' interests. Super Valu rejected this proposal, knowing that the Preferred Merchandisers employees would not be successful in bidding for the positions and the Employer wanted to retain some expertise in the general merchandise department.

The Union also avers it accepted addendum F without advancing the interests of the Preferred Merchandisers unit because it was the only way to avoid a strike. Vairma's testimony is not credited for the above-mentioned reasons. His testimony was not corroborated by any member of the Tower Road bargaining committee. Further, Vairma did not claim he advanced any proposals during the negotiations of addendum F that would have benefitted the Preferred Merchandisers unit, thus his claim they would have been rejected is unwarranted and, at best, merely speculative. If Vairma or any other agent of Respondent made a proposal to the Tower Road bargaining committee that they rejected, there would be some predicate to make this assumption; however, Vairma admitted he completely deferred to the proposals of the Tower Road bargaining committee without any consideration of the impacts on the Preferred Merchandisers unit members; in fact he told Preferred Merchandisers unit members the negotiations of addendum F did not concern them. Respondent has failed to prove this claim by adducing through probative evidence that any attempts to represent the Preferred Merchandisers employees' interests was an act of futility or held a real potential of causing a strike.

Vairma implicitly recognized as Respondent's overriding consideration, the benefit of the Tower Road unit in 1992, and Respondent failed to recognize any duty to the Preferred Merchandisers unit. This complete abandonment of the Preferred Merchandisers unit interests in negotiating matters involving the proposed merger or other combination of the units is the type of arbitrary conduct condemned by the Board in *Teamsters Local 315*, supra at 618.

The fact the issues concerning the combination of the units was resolved in the Tower Road collective-bargaining agreement does not absolve Respondent of their duty of fair representation to the Preferred Merchandisers unit. Respondent did not have to resolve all the issues concerning the consolidation of the units in the Tower Road negotiations. Respondent does not claim the combination issue was a mandatory subject of bargaining. Many of the matters included in addendum F could have been part of the effects bargaining or Respondent could have requested the Preferred Merchandisers collective-bargaining agreement be reopened to negotiate the impact of the consolidation upon Preferred Merchandisers employees. Respondent chose to negotiate the consolidation impacts in the Tower Road collective-bargaining agreement, however, and without the participation of any Preferred Merchandisers employees.

[23] The open bid proposal was accompanied by the proposal the general merchandise department employees receive 85 percent of the Tower Road warehouse rate. Super Valu asserted the need for experience in the general merchandise department and coupled this assertion with the proposed 75-percent rate, which Respondent accepted. Thus, the 75-percent rate did not result from Respondent advancing the interests of the Preferred Merchandisers employees, rather, it was Super Valu's interests that prevailed to the benefit of the Preferred Merchandisers employees.

Respondent also argues to find it had an obligation to fairly represent the Preferred Merchandisers employees the Board would have to overrule the decision in *Simon Levi Co. Ltd*., 181 NLRB 826 (1970). I find the *Simon Levi* case to be inapplicable to the instant proceeding for in *Simon Levi* the union did not represent employees in both units. In contrast, here Respondent represents both units in the instant proceeding, a difference distinguished very effectively in *Riser Foods*, supra, which found the union had no duty of fair representation to units it did not represent while it had an obligation to fairly consider the interests of all employees it represents. Unlike the situation in the *Daly, Inc*. case, supra, 281 NLRB at 976, Respondent has failed to demonstrate it was ''making a bona fide attempt to resolve a problem frequently arising from business merger,'' and fairly considered the interests of all the employees it represents.

Respondent claims it negotiated for the Preferred Merchandisers employees greater seniority rights, greater pay, and greater job preservation than provided in the 1990 Preferred Merchandisers collective-bargaining agreement. Although this argument is facially impressive, it fails to address the uncontroverted facts that Respondent deferred negotiating preservation of Preferred Merchandisers employees' seniority in the event of the combining of Preferred Merchandisers and Tower Road units until the combination was actually proposed by Super Valu and most if not all the gains made by the Preferred Merchandisers employees as a result of the 1992 Tower Road negotiations were attributable to demands made by Super Valu; not Respondent. The increased wage rate was requested as part of a union proposal that all Tower Road employees be permitted to bid for the general merchandise department positions; which, given the Preferred Merchandisers employees' seniority dates as the date of the Preferred Merchandisers collective-bargaining agreement; would probably have precluded most if not all of the Preferred Merchandisers employees from successfully bidding for any general merchandise department positions. Only after Super Valu rejected this union proposal did Respondent propose to limit the general merchandise department positions to selectors and stockers and move the more preferable jobs to the grocery department.

In sum, Respondent failed to adduce any evidence it attempted to promote any of the stated and other interests of the Preferred Merchandisers employees and was shunned or otherwise forced by statements and/or actions of the Tower Road negotiating committee which forced a compromise. There was no compromise claimed; rather, Vairma admitted he construed it as his duty to consider only the interests of the Tower Road employees. Respondent admittedly failed to consider any of the Preferred Merchandisers employees' interests, employees the Union also represented.

Further, Respondent failed to make any attempts to resolve any claimed conflicts of interest between the two groups of employees; rather it acted by deferring to the Tower Road employees, admittedly because they had far greater numbers and were members of the Union for a longer period of time. As found in the *Daly, Inc*. case, such considerations as a basis for endtailing employees is not lawful. Id. at 976. Similar to the *Daly, Inc*. decision, there were no provisions in the collective-bargaining agreements prior to 1992 which required Respondent to advocate the loss of seniority sought here. Contrary to the *Simon Levi* case, Respondent here did

not demonstrate a reasonable basis for its position; rather longevity of union membership and size of unit were the predicates announced by Vairma for the Union's actions; predicates demonstrating unlawful motivation and penalizing the Preferred Merchandisers employees for initially rejecting the Union. Respondent's reasons, found herein to be size of unit and length of union membership after an initial rejection of the Union, are discriminatory and arbitrary, in violation of Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. Super Valu, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Local Union No. 435 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Teamsters Local 435 is the collective-bargaining representative of the Preferred Merchandisers and Tower Road units that were combined at Tower Road; the new Tower Road unit, described above, is an appropriate unit.

4. By negotiating, performing, and giving effect to the 1992 Tower Road collective-bargaining agreement with Super Valu containing provisions which fail to grant the former Preferred Merchandisers employees their company seniority and all their former job positions, rather it sets their maximum seniority date as the date the effective date of the Preferred Merchandisers collective-bargaining agreement and eliminates many of their positions, because (1) the Preferred Merchandisers unit had been union members for a shorter period of time and had initially rejected the Union as the collective-bargaining representative, and (2) the Preferred Merchandisers unit was much smaller than the then Tower Road unit; the Union has failed to represent the Preferred Merchandisers unit in a fair and impartial manner and has restrained and coerced employees in the exercise of their rights guaranteed by Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

5. The aforesaid failure to agree to the Employer's proposal to dovetail the seniority of the Preferred Merchandisers and Tower Road units and/or the failure to advance the interests of the Preferred Merchandisers employees, is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found Respondent has engaged in the unfair labor practice cited above, it is recommended that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

It is recommended Respondent be ordered to notify the Employer and the former Preferred Merchandisers employees that it has no objection to dovetailing the seniority lists of all represented employees in the new Tower Road unit, using the Preferred Merchandisers employees' company seniority. Respondent is also ordered to request further negotiations with Super Valu on the question of the positions to be included in the general merchandise department, including consideration of the bidding procedures, to afford Preferred Merchandisers unit incumbents a reasonable opportunity to retain their Preferred Merchandisers employment positions.

It is recommended Respondent be ordered to make the Preferred Merchandisers employees whole for any loss of pay they may have suffered by reason of Respondent's unlawful actions. The determination of any backpay or the calculation of any other make whole remedy must be deferred to the compliance stage. Any backpay shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*.[24]

As I have determined Respondent is giving effect to an agreement containing unlawful seniority and bidding procedures, it is also recommended it be ordered to refrain from doing so in the future.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Local Union No. 435 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing to fairly represent former Preferred Merchandisers unit members by negotiating, performing, and giving effect to the 1992 Tower Road collective-bargaining agreement with Super Valu containing a seniority provision that fails to grant the former Preferred Merchandisers employees their company seniority and removed several positions these employees held from the new department they were assigned to work in after they were combined with the Tower Road unit.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Employer and all former Preferred Merchandisers employees that it has no objection to their restoration to a position on the seniority list which reflects length of service with Preferred Merchandisers, and that it has no objection to negotiate with the Employer on the issue of restoring the positions removed from the Preferred Merchandisers employees or, in the alternative, negotiating procedures for bidding for these positions that would give the Preferred Merchandisers incumbents an opportunity to bid on these positions in a manner that affords these employees a reasonable

[24] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp*., 231 NLRB 651 (1977).

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

opportunity to maintain their Preferred Merchandisers positions.

(b) Stop giving effect to the provisions of addendum F of the Tower Road collective-bargaining agreement that contains the unlawful seniority and bidding procedures.

(c) Make whole each of the employees as determined in the compliance proceeding to be eligible, in the manner set forth in the remedy, for any losses they may have suffered as a result of the Respondent's conduct found above to have been violative of Section 8(b)(1)(A) of the Act.

(d) Post at its business office and other places where notices to its members are customarily posted copies of the attached notice, marked ''Appendix.''[26] Copies of the attached notice, on forms provided by the Regional Director for Region 27, after being signed by the Repondent's authorized representative, shall be posted by the Respondent immediately receipt and maintained for 60 consecutive days in conspicuous places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, or covered by any material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply. For the purpose of determining or securing compliance with this Order, the Board, or any of its authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors, or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure.

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to treat all employees we represent in a fair and impartial manner.

WE WILL NOT perform and give effect to those portions of 1992 Tower Road collective-bargaining agreement with Super Valu that fail to grant the former Preferred Merchandisers employees their company seniority and their former employment positions for discriminatory and/or arbitrary reasons such as (1) the Preferred Merchandisers unit members had been union members for a shorter period of time and had initially rejected the Union as the collective-bargaining representative, and (2) the Preferred Merchandisers unit was much smaller than the then Tower Road unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of rights guaranteed you by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

WE WILL notify the Employer, Super Valu, Inc., and each of the Preferred Merchandisers employees that we have no objection to the restoration of the Preferred Merchandisers employees to a position on the seniority list that reflects length of service with Preferred Merchandisers, and that we have no objection to negotiating with the Employer on the issue of restoring the positions removed from the Preferred Merchandisers employees or, in the alternative, negotiating procedures for bidding for these positions that would give the Preferred Merchandisers incumbents an opportunity to bid on these positions in a manner that affords these employees a reasonable opportunity to maintain their Preferred Merchandisers positions.

WE WILL stop giving effect to those provisions of the Tower Road collective-bargaining agreement that contain unlawful seniority and bidding procedures.

WE WILL make whole each of the employees determined during the compliance stage of this proceeding to be eligible, in the manner set forth in the remedy, for any losses they may have suffered as a result of the Respondent's conduct found above to have been violative of Section 8(b)(1)(A) of the Act.

LOCAL UNION NO. 435 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO